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986375—52——1

In the Supreme Court of the United States

BELL AIRCRAFT CORPORATION

No. 559

THE UNITED STATES, PETITIONER

v.

BELL AIRCRAFT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on October 2, 1951.

OPINION BELOW

The opinion of the Court of Claims (R. 101) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1951 (R. 135). On December 29, 1951, the Chief Justice extended the time for filing a petition for certiorari to January 30, 1952 (R. 136). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. A standard provision in cost-plus-a-fixed-fee contracts provides that "allowable items of cost will be determined by the contracting officer" and contains no express language giving his determination finality. The question is presented whether that provision renders conclusive, and immune from judicial consideration, determinations of law, coming within its scope.

2. Whether, under the foregoing provision, the Court of Claims had any warrant for holding conclusive a decision of one contracting officer adverse to the Government as to allowable items of cost, while denying conclusiveness to a decision of a successor contracting officer in favor of the Government on the identical question.

3. Whether the Court of Claims erred in holding that the determination that certain claimed costs were not incurred incident to and necessary for the performance of the cost-plus-a-fixed-fee contracts was a determination of law which was not within the standard form provision that administrative decisions "on all disputes concerning questions of fact * * * shall be final and conclusive upon the parties * * *."

4. Whether, assuming the question was properly before it for decision, the Court of Claims erred in awarding reimbursement, under cost-plus-a-fixed-fee contracts, for items which the parties understood, when the contracts were

entered into, would not be claimed as reimbursable costs.

CONTRACT AND REGULATION PROVISIONS INVOLVED

The pertinent portions of the contract and regulation provisions are set forth in the Appendix, *infra*, pp. 19–24.

STATEMENT

This action arises out of respondent's claims for reimbursement of certain costs under four cost-plus-fixed-fee (CPFF) contracts with the United States. The Court of Claims' findings disclose the following pertinent facts:

In 1936–38, respondent received several fixed-price contracts from the Army Air Corps for the construction of certain experimental fighter planes (R. 67). The contract price agreed to and paid by the United States was insufficient to compensate respondent for the heavy experimental and development costs it had incurred under the experimental contracts (R. 69). Respondent accordingly deferred and capitalized these excess costs, amounting to $1,528,760.66[1] (R. 69).

In 1939–41, respondent entered into several fixed-price contracts with the Air Corps for the production of about 1,000 P–39 fighter planes at a cost of over 37½ million dollars (R. 71). During this period, respondent also entered into fixed-price contracts with the British Government for

[1] This was later adjusted to $1,499,739.23 after audit by the Army Audit Agency (R. 70).

the production of about 800 P–39's for almost 34 million dollars (R. 71).

The mass production of this large quantity of planes for the United States and Great Britain required respondent to incur production-tooling costs amounting to $1,894,109.57, which it deferred and capitalized[2] (R. 72). By the end of 1942, respondent had fully amortized all of these deferred production tooling costs and all of the deferred experimental and development costs against deliveries of the 1800 P–39 planes under its fixed-price contracts with the United States and Great Britain (R. 76).

In the meantime, starting August 14, 1941, respondent was awarded a series of CPFF contracts by the Air Corps for the production of over 10,000 additional P–39 planes at a total estimated cost of 307 million dollars plus a fixed fee of over 14 million dollars (R. 76–77). Three of the four contracts, calling for the production of over 5,000 planes, were entered into in 1941 and 1942, while respondent was still amortizing its experimental, development and tooling costs solely against the fixed-price contracts (R. 77). In the course of the negotiations for the CPFF contracts, it was understood by both parties that respondent did not intend to allocate any of the deferred costs against production under the CPFF contracts and there-

[2] This was later adjusted to $1,874,725.77 after audit by the Army Audit Agency (R. 72).

fore did not include any part of such costs in its cost estimates for those contracts (R. 82, 125).

In March 1942, the Bureau of Internal Revenue audited respondent's returns and required respondent, for tax purposes, to allocate the deferred experimental, development, and tooling costs to all P–39 production under both the CPFF contracts and the fixed-price contracts (R. 81).[3] Respondent refused to comply and, as already noted, continued to amortize the deferred costs solely against the fixed-price contracts until the end of 1942, when all the costs were fully charged off to the fixed-price contracts (R. 81–82). In September 1942, respondent explained this refusal to comply with the Bureau's requirement by stating that (R. 82):

> This item [deferred experimental, development and production tooling costs] should be allowed as an amortization expense against the fixed-price contracts only in view of the fact that any amortization to be allowable under a cost-plus-fixed-fee contract would have to be included in the original negotiations of such contract. No provision is made for that on any of our cost plus contracts in view of the position taken by the Government that prior to our

[3] This reallocation would have resulted in higher profits under the fixed-price contracts and thereby increased respondent's income taxes for the years during which the fixed-price contracts were performed. However, as it turned out, respondent's tax liability was increased by only $32,056.17 because of the reallocation (R. 134).

> entry into cost plus contracts we have received sufficient fixed price contracts to permit the amortization of deferred experimental expenses.

In April 1943, respondent's comptroller submitted to the Air Corps a statement of accounting policies pertinent to the company's operations under the CPFF contracts, reiterating that the costs were chargeable only to fixed-price production (R. 82):

> Experimental, development and production tooling expenses are written off against the deliveries of the items to which expenditures apply. No experimental expense is charged to overhead applicable to CPFF contracts.

Six months later, however, respondent wrote to the Price Adjustment Officer in charge of renegotiation of respondent's contracts, proposing to reallocate its deferred charges as requested by the Bureau of Internal Revenue "provided that the amounts disallowed by you against fixed price contracts become items of reimbursable costs under our cost plus a fixed fee contracts and are allowed and reimbursed as such by the Contract Audit Section of the Army Air Forces and the General Accounting Office" (R. 83). Upon approval of this proposal on September 9, 1943, by the Price Adjustment Officer for renegotiation purposes, respondent restored to the deferred account on its books a proportion of the experimental, development, and tooling expenses which it con-

sidered applicable to the CPFF contracts in accordance with the new plan of amortization (R. 84). The sum so restored amounted to $2,286,-819.95, the unrestored difference of $1,087,645.05 remaining applicable to the fixed-price contracts (R. 84–85).

Claiming that it was entitled to reimbursement under the CPFF contracts for the $2,286,819.95 so allocated by it, respondent submitted two sets of vouchers to the Air Corps for payment of that sum (R. 85). The first set of vouchers, allocated to deliveries under the CPFF contracts from 1942 to August 1943, and submitted in September 1943, amounted to $1,299,856.02 (referred to as the 1¼ million dollar claim) (R. 84–85). The second set of vouchers, allocated to deliveries under the CPFF contracts after August 1943, and submitted in October 1943, amounted to $986,963.93 (referred to as the $980,000 claim) (R. 85).

The Assistant Resident Auditor for the Air Corps recommended that the vouchers for the 1¼ million dollar claim be rejected on the ground *inter alia* that all of the costs had been charged off to the fixed-price contracts (R. 85). This recommendation was rejected and the vouchers were approved by the Resident Auditor for the Air Corps. They were also approved by the Contracting Officer and the 1¼ million dollar claim was paid to respondent by the United States, but later recouped after objection by the Comptroller General (R. 85, 87).

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The same Assistant Resident Auditor recommended rejection of the vouchers for the $980,000 claim for the same reasons he had recommended against the other claim (R. 86). By this time, the former Resident Auditor and the former Contracting Officer had been replaced. Their successors accepted the Assistant Resident Auditor's recommendation and declined to approve the vouchers for the $980,000 claim (R. 86, 88).

On March 1, 1945, the new Contracting Officer issued findings of fact on respondent's two claims, pointing out that the total of both claims, "the $2,286,819.95 which Bell had charged on its book against CPFF contracts did not, in fact, represent costs of performing such CPFF contracts," that "the costs in question were in fact recovered by [respondent] through the fixed-price contracts" and that "reimbursement for such costs under the CPFF contracts would result in Bell's receiving double payment from the Government" (R. 88–89, 91). The finding concluded that respondent was not entitled to reimbursement under its CPFF contracts "for any portion of the said sum of $2,286,819.95" (R. 89).

On respondent's appeal under Article 16 of the CPFF contracts (the general Disputes article) from that portion of the Contracting Officer's findings which denied the $980,000 claim, the War Department Board of Contract Appeals affirmed (R. 89–91). Respondent took no appeal from the Contracting Officer's denial of the 1¼

million dollar claim, which had theretofore been paid but recouped (R. 89).

Respondent then brought the instant suit in the Court of Claims, demanding payment of the 1¼ million dollar claim and of the $980,000 claim (R. 1–17). The court concluded that respondent was entitled to recover the full amount of both claims and awarded judgment for $2,286,819.95 (R. 101, 135). Chief Judge Jones and Judge Madden dissented (R. 132–133). Judge Jones agreed that respondent was entitled to recover on the 1¼ million dollar claim, but stated that he would disallow the $980,000 claim (R. 132). Judge Madden pointed out that it was "beyond question" that the parties intended "that the costs here sued for were not to be reimbursable" under the CPFF contracts, and that, accordingly, respondent's "recovery is a complete and unexpected windfall of $2,286,819.95" (R. 134). He was therefore of the opinion that recovery should have been denied on both claims (R. 135).

REASONS FOR GRANTING THE WRIT

The majority of the Court of Claims held that the determination that the costs were incurred incident to the performance of the CPFF contracts is a question of law (R. 121), and that therefore the decision of the Board of Contract Appeals in favor of the United States on the $980,000 claim was not entitled to the finality accorded by Article 16 to administrative resolution

of "disputes concerning questions of fact" and could be judicially reconsidered. At the same time it concluded that the decision of the first contracting officer against the United States on the identical question with respect to the 1¼ million dollar claim was binding and conclusive. In short, the Court of Claims has held that a contracting officer's decision adverse to the Government is binding but that one favorable to the Government may be reviewed and set aside. We believe that the obvious and far-reaching implications of such an inconsistent holding require its review by this Court. In addition, the Court of Claims avoided the binding effect of Article 16 with respect to the determination in favor of the United States by erroneously characterizing the factual issue involved as one of law. The net result of all this is to give respondent a windfall of 2¼ million dollars by awarding it reimbursement for expenses which, when the contracts were entered into, all parties concededly contemplated would not be reimbursable.

1. There is no doubt that the "Disputes" provisions in Article 16 of each of the CPFF contracts made final and conclusive only those administrative determinations concerning questions of fact (R. 80, Appendix, *infra,* p. 23). Consequently, if the Court of Claims was correct in holding that the question whether the developmental, engineering, and tooling costs were incurred incident to the performance of the CPFF

contracts was a question of law, we would agree that the parties and the court were not bound by the decision of the Board of Contract Appeals in favor of the United States on the $980,000 claim. It would also follow, if that holding was correct, that the first contracting officer's decision against the United States on the 1¼ million dollar claim would not be binding on the parties nor on the Court of Claims.

In holding that the 1¼ million dollar determination against the United States, although treated as a determination of law, was "conclusive and binding," the Court relied on Article 3 (b) of the contract (*infra*, p. 19). But Article 3 (b) simply authorizes the contracting officer to determine the amounts of reimbursable costs in accordance with certain Treasury Department regulations (R. 78, Appendix, *infra*, p. 19). Article 3 (b) has no express finalty clause nor any language from which a special finality provision should be implied.[4] The Court's holding that

[4] In holding that an Article 3 (b) determination of a question of law was binding and conclusive, the court below was apparently influenced by respondent's reliance in that court on *United States* v. *Moorman*, 338 U. S. 457. Article 15 in that case, like Article 16 here, limited finality to disputed questions of fact. The Supreme Court nevertheless held that the Contracting Officer's determination under Par. 2–16 (a) of the specifications was final and binding, whether the question was one of fact or law. But Par. 2–16 (a), unlike the Article 3 provisions here, stated "in language as plain as draftsmen could use that findings of the Secretary of War in disputes of the type here involved shall be 'final and binding.'" *United States* v. *Moorman*,

the first administrative determination against the United States on the 1¼ million dollar claim was final and binding is therefore in complete disregard of the contract provisions.[5] But at the very least, if Article 3 (b) is to be construed as a provision according finality to determinations of the contracting officer, it must make such determinations binding on both parties. By no proper process of reasoning can Article 3 (b) be read as making determinations against the Government conclusive, while leaving the Court of Claims free to reconsider identical determinations in the Government's favor.

2. The court's characterization of the administrative determinations here involved as legal,

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338 U. S. 457, 463. For the same reason, *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 325, is not in point here—the Article 4 in the contract in that case, unlike Article 3 here, expressly made the cost determination "final and binding."

Respondent also relied in the court below on *Great Lakes Dredge and Dock Co.* v. *United States*, 116 C. Cls. 679, 119 C. Cls. 504, now pending on petition for certiorari, No. 466, this Term. There, however, unlike the instant case, the Disputes Article did not limit finality to factual questions but expressly covered "all disputes concerning questions arising under this contract." 119 C. Cls. 504, 508.

[5] It is well settled that, absent any contractual provision according finality to administrative action, the Government may, as it did here, recoup moneys paid out by a public officer under mistake of either fact or law. *United States* v. *Wurts*, 303 U. S. 414; *Wisconsin Central R. R.* v. *United States*, 164 U. S. 190, 212; *United States* v. *Burchard*, 125 U. S. 176; *Heidt* v. *United States*, 56 F. 2d 559 (C. A. 5), certiorari denied, 287 U. S. 601; *United States* v. *Sutton Chemical Co.*, 11 F. 2d 24 (C. A. 4).

rather than factual, also constitutes, we submit, serious error warranting review here.

The "finality clause" in Article 16, which makes the administrative determination of all factual disputes final and conclusive, has been uniformly enforced by this Court in the several cases which have been brought here because of the continued "tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions under contracts." See *United States* v. *Moorman,* 338 U. S. 457, 460, note 3; *United States* v. *Wunderlich,* 342 U. S. 98; *United States* v. *Callahan Walker Co.,* 317 U. S. 56. To the extent that the Court of Claims improperly characterizes factual questions as questions of law, the binding scope given Article 16 by this Court's decisions is largely nullified.

The administrative determination that the experimental, development, and tooling costs were not incurred incident to the performance of the CPFF contracts was solely one of fact. Despite the position taken by the Court of Claims, the construction of the terms of the contractual provisions authorizing reimbursement for certain costs was not in controversy. There was no dispute that experimental, development, and tooling costs previously incurred could in appropriate cases be reimbursed under CPFF contracts. The Board of Contract Appeals' decision proceeded on that assumption (R. 90). But whether

such costs were reimbursable in a particular case depended on whether they were "incident to and necessary for the performance" of the CPFF contracts in question (T. D. 5000, 26 C. F. R. 26.9 (a) Appendix, *infra*, p. 20).[8] The sole inquiry therefore in this case was whether and to what extent the costs had been incurred as a necessary incident of performance of the CPFF contracts. Such an inquiry, calling for examination of "all of the circumstances and facts involved" (R. 90) seems obviously a question of fact. Here, the circumstances and facts showed that when the CPFF contracts were negotiated, neither party intended to allocate the experimental, development, and tooling costs to the CPFF planes, that no such additional costs were included in the estimate of total CPFF costs, and that respondent fully amortized all of these costs against planes produced under the fixed-price contracts. The intent not to allocate any part of such costs to CPFF production, coupled with actual amortization of all of such costs against planes produced under the separate fixed-

[8] The Treasury Department Regulations contained in T. D. 5000 were promulgated pursuant to the Vinson-Trammel Act of March 27, 1934, as amended by the Acts of June 25, 1936, April 3, 1939, and June 28, 1940 (48 Stat. 505, 49 Stat. 1926, 53 Stat. 560, 54 Stat. 677; 50 U. S. C. App. 1153). These statutes limited profits on sales to the Government of Army and Navy vessels and aircraft. The regulations contained detailed provisions for determining reimbursability of costs incurred by contractors making such sales (Appendix, *infra*, pp. 20–22).

price contracts, could only mean that these costs were not incurred as a necessary incident of the CPFF contract performance. The contracting officer accordingly concluded that these costs "did not, in fact, represent costs of performing such CPFF contracts" (R. 89). Since the issue was factual, the decision of the Board of Contract Appeals affirming the contracting officer's decision on the $980,000 claim was final and binding and should not have been set aside by the court below. *United States* v. *Wunderlich*, 342 U. S. 98.[7]

3. Even if the question be treated as one of law which the Court of Claims was free to consider, we think its decision of that question was so clearly wrong as to warrant review by this Court. As Judge Madden pointed out, the decision gives respondent "a complete and unexpected windfall of $2,286,819.95" (R. 134) by allowing it to recover "for something [for] which, when it made the

[7] With respect to the 1¼ million dollar claim, we reserve the right, in the event the writ is granted, to contend that, treating the question as one of fact, the second contracting officer was free to reconsider his predecessor's determination—either on the ground that the decision of the first contracting officer was not a decision of a "dispute" within Article 16, or on the ground that, prior to final settlement of the contract, it was open to a contracting officer in any case to reconsider prior decisions of himself or his predecessor—and that the second contracting officer's decision upon such reconsideration, not having been appealed from (*United States* v. *Blair*, 321 U. S. 730, 734–736), is controlling and cannot be judicially reviewed.

contract under which it claims the payment, it intended that it should be paid nothing at all" (R. 133). The record is clear that at the time these CPFF contracts were entered into, all parties understood that no part of the experimental, development, and tooling costs previously incurred was to be a reimbursable item of cost. To allow respondent to recover in respect of those costs is to impose on the United States an obligation to which it never agreed.[8]

4. The questions are of general importance. We are informed by the Department of the Air Force that the provision embodied in Section 3 (b) of the instant CPFF contracts was a standard provision in CPFF contracts negotiated by

[8] The fact that respondent's decision to claim reimbursement for these expenses under its CPFF contracts was the result, at least in part, of pressure from the Bureau of Internal Revenue, with respect to taxes, does not justify the result reached by the Court of Claims. The Bureau had no power to amend the CPFF contracts or to determine what items should be reimbursable under them. Moreover, it is significant that the tax adjustment increased respondent's net tax liability by approximately $32,000, as compared with the amount of $2,286,819.25 here awarded respondent (R. 134). And, while the renegotiation agreement contemplated that the cost items here awarded respondent would be amortized against the CPFF contracts and not against the fixed-price contracts, respondent merely accepted a contingent liability in respect of them, agreeing to pay the United States $667,000 in the event that these expenses should be allowed and reimbursed under the CPFF contracts (R. 132). (The renegotiation agreement referred to covered profits for 1942. There were no deliveries under the fixed-price contracts after 1942 (R. 71, 76).)

the Air Force between 1940 and March 1949, numbering several thousand contracts involving hundreds of millions of dollars, and that since March 1949, a similar provision—differing principally in its reference to Part XV of The Armed Services Procurement Regulations, 32 C. F. R. (1950 Supp.) Part 414, rather than T. D. 5000 for the applicable cost principles—has been standard in CPFF contracts. It is of obvious importance in administering such contracts and in litigation arising under them to know whether the section will, despite the absence of any express language of finality, be construed as rendering final decisions of law of the contracting officer as to allowable items of cost. It is also of obvious importance in administering cost-plus contracts generally that the Government be not held liable for items of cost which the parties contemplated would not be reimbursable.

In addition, the decision below causes further confusion in the vexing area of finality of administrative decisions under Government contracts. In the first place, while we have repeatedly insisted that where a contractual provision calls for finality it be given effect, we think it no less important that where a contractual provision does not call for finality it should not be held to render decisions unreviewable. The holding that Section 3 (b), despite the absence of any language of finality, rendered conclusive against

the Government the first contracting officer's decision plainly violates this principle. In the second place, the decision below, if unreviewed, affords an opportunity for undercutting the standard "disputes" provisions, contained in Section 16 of these contracts, by erroneously characterizing as questions of law issues which are really questions of fact. Finally, the decision indicates the tendency of the Court of Claims to apply the rule of finality unequally. Given two administrative determinations of the identical issue, that court reaches the extraordinary result that the one adverse to the Government is final and cannot be reconsidered, while that favorable to the Government can be reconsidered. It does this by misconstruing Section 3 (b) in the one case and ignoring it in the other and by erroneously characterizing issues of fact as issues of law. The implications of such a holding clearly call for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1952.

APPENDIX

1. Each of the four CPFF contracts contains the following provisions (R. 77–78):

ARTICLE 3. CONSIDERATION

(a) The Government will pay the Contractor upon satisfactory delivery of all items specified in the Contract, subject to reimbursement for cost, as outlined in Article 6 hereof, the cost, plus a fixed fee of * * * being * * * percent of the total estimated cost of * * *. This estimated cost and the fixed fee are subject to increases or decreases resulting from authorized changes as provided in Article 5 hereof. Provided, however, that there shall be no adjustment in the amount of the fixed-fee as provided herein, nor shall there be any claim for increased compensation, because of any errors and/or omissions made in computing the original estimated cost of the work or where the estimated cost varies from the actual cost.

(b) For the purpose of determining the amount payable under this Contract, allowable items of cost will be determined by the Contracting Officer in accordance with Regulations for determination of the cost of performing a Contract as promulgated by the Treasury Department in Section 26.9 of Chapter 1 of Title 26 of Code of Federal Regulations, as contained in T. D. 5000 and approved by the Secretary of War August 2, 1940. It being understood and agreed without limiting the generality of the foregoing, that

(1) All costs which have been incurred by the Contractor in anticipation of this Contract and prior to the signing thereof, and which if incurred after the signing of this Contract, would have been considered as allowable items of cost within the meaning of said Regulations, shall be considered as allowable items of cost incurred hereunder.

2. The Treasury Department regulations referred to in Article 3 (b) of the contracts *supra*, provide in pertinent part (26 C. F. R. 26.9, 1940 Supp.):

> § 26.9 *Cost of performing a contract or subcontract*—(a) *General rule.*—The cost of performing a particular contract or subcontract shall be the sum of (1) the direct costs, including therein expenditures for materials, direct labor and direct expenses, incurred by the contracting party in performing the contract or subcontract; and (2) the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of the contract or subcontract.
>
> (b) *Elements of cost.*—No definitions of the elements of cost may be stated which are of invariable application to all contractors and subcontractors. In general, the elements of cost may be defined for purposes of the Act as follows:
>
> (1) Manufacturing cost, which is the sum of factory cost (see paragraph (c) of this section) and other manufacturing cost (see paragraph (d) of this section);
>
> * * * * *

(c) *Factory Cost.* Factory cost is the sum of the following:

* * * * *

(5) *Indirect factory expenses.* Items, usually termed "factory overhead," which are not directly chargeable to the factory cost of performing the contract or subcontract but which are properly incident to and necessary for the performance of the contract or subcontract and consist of the following:

* * * * *

(iv) *Fixed charges and obsolescence.* Recurring charges with respect to property used for manufacturing purposes of the contract or subcontract, such as premiums for fire and elevator insurance, property taxes, rentals and allowances for depreciation of such property, including maintenance and depreciation of reasonable standby equipment; and depreciation and obsolescence of special equipment and facilities necessarily acquired primarily for the performance of the contract or subcontract, except special additional equipment and facilities with respect to which the Secretary of the Department concerned has made a certification binding upon the Commissioner of Internal Revenue, pursuant to section 4 of the Act, in the case of such contract or subcontract. * * *

* * * * *

(d) *Other manufacturing cost.* Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or

satisfactorily chargeable to factory costs (see paragraph (c) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs purchased and patent rights over their useful life; and "deferred" or "unliquidated" experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or subcontract. In the case of general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract.

* * * * *

3. a. The Disputes Article in three of the CPFF contracts provides (R. 80):

ARTICLE 16. DISPUTES

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with performance.

b. The Disputes Article in the fourth CPFF contract provides (R. 81):

ARTICLE 16. DISPUTES

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals, other than the Contracting Officer, or a board as his authorized representative to determine appeals under this Article. * * * Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance

of this contract. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

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NO. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES, *Petitioner,*

v.

BELL AIRCRAFT CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

STATUTE:

Vinson-Trammel Act of March 27, 1934, as amended by the Acts of June 25, 1936, April 3, 1939, and June 28, 1940 (48 Stat. 505, 49 Stat. 1926, 53 Stat. 560, 54 Stat. 677; 50 U.S.C. App. 1153) 4

T.D. 5000, 26 C.F.R. (1940 Supp.) 4, 9, 13